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Supreme Court of the United States

OCTOBER TERM, 1944

No. 1054

THE STATE NATIONAL BANK OF MARSHALL,
IN LIQUIDATION,
Petitioner,

vs.

W. D. TITTLE,
Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR CERTIORARI

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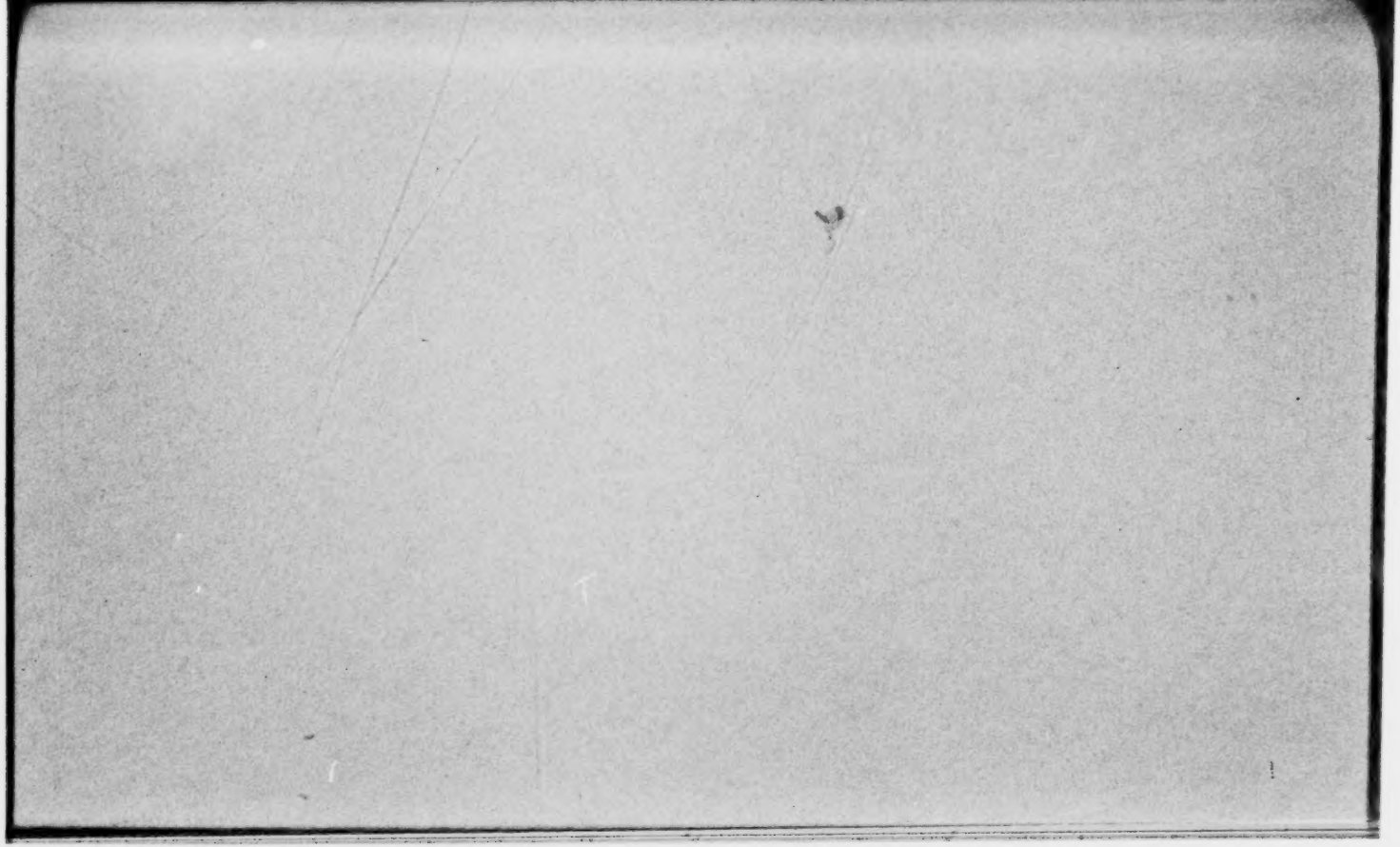

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—1—

The opinion of the Supreme Court of Texas is reported in 183 S. W. (2nd) 720, and that of the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas in 179 S. W. (2nd) 1010.

—2—

Statement of the Case

The facts and pertinent parts of the record are correctly stated in the opinion of the Court of Civil Ap-

peals (R52), the Texas court of last resort on fact issues.* The petition does not contain a correct statement of either. We respectfully submit the following statement in lieu of that contained in the petition and supporting brief:

Petitioner, a solvent National Bank in voluntary liquidation with all of its debts paid (R. 116 and 149), sued respondent, called Tittle, to recover on a note for $2,000.00 executed by him to the Bank, dated July 17, 1942, payable ninety days after date (R. 3-5). The note was the second renewal of a $3,000.00 note Tittle executed to the Bank on December 31, 1941. Tittle pleaded several defenses to the note, among which was that the original note was executed under an agreement that its proceeds would be applied to the payment of an overdraft of the Waterman Brick & Tile Company, called Brick Company, which when added to its note indebtedness to the Bank, exceeded the amount the Bank could lend to a single customer, and that W. M. Thomas, Vice-President, Cashier, and Chief Executive Officer of the Bank, and its sole representative in the transaction, acting for the Bank and the Brick Company, agreed that a large sum of money then due the Brick Company under a contract for its products used in the construction of the Lone Star Ordnance Plant, and later received by the Bank, would be applied to the payment of the note; that such agreement created a trust in the fund in Tittle's favor, and operated as an assignment of a sufficient amount thereof to liquidate the note; that the receipt

*1, Texas Constitution, Article 5, Section 6: "Provided that the decision of said courts shall be conclusive on all questions of fact brought before them on appeal or error."

R. S. Article 1820: "The judgments of Courts of Civil Appeals shall be conclusive in all cases on the facts of the case."

of the fund by the Bank operated as a full payment of the original note, and the two renewal notes were procured by fraudulent representations, the first, that nothing had been received on the contract, and the second, that only the $1,000.00 applied to the note, had been received (R. 5-15). The Court of Civil Appeals and the Supreme Court of Texas both held that the facts pleaded constituted a good defense to the note, and that every fact essential thereto was found by the jury, or established by stipulation of the parties or undisputed evidence.

In answer to special issues the Jury found the following facts supporting the defense: At the time the note was executed Thomas agreed with Tittle that the note would be paid out of the funds under the Lone Star contract; at the time the note was executed Thomas represented to Tittle, and Tittle believed, the proceeds thereof would be applied to the payment of the Brick Company's overdraft; that Tittle was induced to execute the first renewal by the fraudulent representation by Thomas that nothing had been received under the contract, and the second note, upon the fraudulent representation that only the $1,000.00, which had been applied to the note, had been received (R. 37-42). None of these findings was attacked by the Bank in the trial court, nor in either of the appellate Courts. All were established by substantial evidence (R. 123-125). Indeed the plaintiff's witness Thomas admitted the false representations were made (R. 150-2). He denied out right that he had made the agreement that the contract fund would be applied to the note, which is probably the basis for the Bank's claim that his testimony was that he did not

make the agreement for the Bank. He did admit that he told Tittle that the Bank had let the Brick Company have all that it could, and the Bank wanted Thomas to let the Brick Company have more money, and he wished to borrow for that purpose (R. 149-50). He further admitted that he told Tittle he wanted the money to use in taking care of obligations until the money came in, and was borrowing the money against the Brick Company's receipts (R. 152, 153). The Bank plead that Thomas represented the Brick Company in the transaction (R. 23). The undisputed evidence of Thomas (R. 143), and Holland (R. 151) established the authority of Thomas to make the agreement for the Brick Company. The officials of the Bank testified that it was Thomas' duty to collect the overdraft, and the directors expected him to do so (R. 167, 105-6). Both Thomas and Tittle testified that Thomas was the only officer or employee of the Bank who had anything to do with taking the original note and the renewals thereof, and that he alone acted for the Bank in all of the transactions (R. 153-138). This testimony was not disputed. The parties stipulated that beginning on January 13, 1942, and ending on April 29th, 1942, payments totalling over $30,000.00 were received under the Lone Star contract, and deposited by the Bank to the credit of the Brick Co. (R. 120-2). It is true as stated in the brief that Holland, Assistant Cashier of the Bank and its Liquidating Agent, testified that the proceeds of the $3,000.00 note did not go to the credit of the Brick Company, if this is material to the issue here involved. However, on cross examination he admitted "I haven't been able to show where it," meaning proceeds of the

note, "went; but know it didn't go to the Waterman Brick & Tile Company that day or Mr. Thomas; I don't know where it went. I have an idea, but I don't know." (R. 168). Thomas testified the proceeds of the note went into the Brick Co.'s account. (R. 150).

In its efforts to raise a Federal question, the Bank has repeatedly stated in its petition and brief that the agreement to apply the funds from the contract to the payment of the note was a secret agreement, the note was a sham note, never to be paid, and intended only to deceive the banking authorities, and both were parts of a scheme to violate the national banking laws by making the books of the bank reflect a false condition of its affairs, but utterly ignores the undisputed evidence and findings of the jury to the contrary. We quote the testimony of Tittle given in answer to persistent questioning from the Bank's counsel:

"Q. You knew this note you gave December 31, 1941 didn't represent $3,000.00 that the Bank could Collect?

"The Witness: I knew they could collect.

"Q. Not from you?

"A. They could collect it from me.

"Q. You recognized you were responsible for the note?

"A. He told me I wouldn't have to pay it.

"Q. And you were not responsible for it?

"A. I knew I was responsible for it— He told me I didn't have to pay it.

"Q. You knew the Bank could collect it, when you made it?

"A. Yes, sir.

"Q. You gave it to them and knew they could collect it?

"Q. That is true?

"A. Yes, sir." (R. 135.)

* * * *

"As to why I didn't write on that note never to be paid, I expected the note to be paid from the proceeds from the Ordnance Plant. I did not think it was a sham note, but thought that it would be paid from the contract. (R. 138).

* * * *

"When this note was executed and Mr. Thomas made the statement to me, I did not know Mr. Thomas wouldn't make the records of the Bank reflect the true state of affairs and facts about it. I did not know that Thomas intended to use the note for an unlawful purpose, nor was there anything to cause me to suspect Mr. Thomas intended to violate the law." (R. 125)

* * * *

"Q. You told us several things that was said and I gave you a little time to think about it, and you didn't tell us anything about Willis making a record in the Bank to show you were free; Willis didn't say anything about doing that?

"A. No, sir, he didn't.

"Q. You knew no record would not be made about it?

"A. I did not know about it; I figured it would be handled in the usual way." (R. 130)

* * * *

"I did not think the note would appear as a false asset in the bank statement. I had no reason to suspect the books of the Bank wouldn't reflect the agreement under which the note was executed. I did not have access to the books of the Bank, and would not have executed the note if I had known that Mr. Thomas failed to make the proper record of it in the Bank. I did not know that the Bank examiner did not know all of the facts in connection with the note. I did not know if Mr. Thomas intended to deceive the Bank examiner about it." (R. 139).

The agreement was made at the desk of Mr. Thomas in the Bank near the desk of another officer (R. 122),

and though the Bank has repeatedly made the statement that the agreement was a secret one, it cites no part of the record to sustain the statement, and it cannot do so. The Bank did not request the submission of an issue on the agreement being a secret one. The Jury found in answer to an issue requested by the Bank that the original note was given to borrow $3,000.00 for the purpose of lending it to Thomas and for the accommodation of Thomas (R. 48-9). Out of an abundance of caution Tittle in the Court of Civil Appeals, assigned error attacking these findings as being inconsistent with the findings that the note was given for the purpose of raising funds with which to discharge the overdraft, and if the findings had in fact been in conflict, Texas procedure would have required that the case be reversed and remanded for a new trial, but the Court properly held that the findings were reconcilable.

When the original note was executed the Bank could lawfully lend only $15,000.00 to a single customer, and the Brick Company's note indebtedness at that time was $14,406.46 (R. 105). The record does not show the amount of the Brick Company's overdraft at that time as the teller sheets were destroyed after the Bank went into liquidation. It was shown however, that at that time the Bank was carrying as cash items the following checks drawn by the Brick Company and paid by the Bank without having funds on hand sufficient to cover:

(1) For $3,000.00 payable to Continental American Bank and Trust Company, dated October 15, 1941.

(2) For $1,242.76 payable to the Bank, dated November 10, 1941.

(3) For $2,034.53, payable to the Bank, dated December 22, 1941.

(4) For $354.40, payable to Standard Tool & Machine Co. dated December 22, 1941.

(5) For $480.20 payable to L. & A. Railway, dated December 19, 1941. (R 115-116)

The average daily overdraft of the Brick Company during the month of December 1941 was $11,217.00, and for January 1942 $7,493.00 (R. 106-7). For a long period of time continuing to the liquidation of the Bank in July 1942, the Brick Company was permitted to overdraw its account under an arrangement by which it was charged twenty-five cents for each check that overdrew the account, and 10% interest on the average daily overdraft balance (R. 106, 155). "I think this overdraft for Waterman Brick & Tile Company was a very profitable thing for the Bank." (Thomas' testimony, R. 156.) Each month an analysis slip was prepared showing the average daily overdraft, the amount charged therefor, and other details, and these slips were cleared through the Brick Company's account as checks and posted on the books of the Bank (R. 111). Many of these slips were introduced and showed the Brick Company's account to have been overdrawn for practically every month from November 1940 until the Bank went into liquidation. Thomas was financially interested in the Brick Company, and Holland, an executive officer of the Bank, had known this since 1941, and that he became its general financier about that time (R. 105, 114). Ob-

viously the directors had the same information because many of them executed notes to the Bank and let Thomas have the money for the Brick Company.

Thomas testified that he did not know how long he had followed the practice of having the directors and stockholders of the Bank execute notes to the Bank and lend him the money for the Brick Company and his other financial ventures; he said about eight or ten years with the directors, and about two or three years with the stockholders, outsiders, and customers of the Bank (R. 155); the President and Directors had access to the records of the Bank, and these transactions could easily have been checked (R. 157); he did not borrow from every stockholder available, but he estimated that transactions of this kind occurred with about fifty of them (R. 154); and Holland knew of practically every transaction (R. 154). Holland could recall only about half a dozen stockholders who executed notes of this kind, but according to his testimony several of such notes were executed by stockholders, directors, and the Bank's attorneys, and were on hand when the Bank went into liquidation (R. 144, 146).

It is true as stated in the Bank's petition and brief, Tittle alleged that the Brick Company's line of credit had been criticized by the Bank Examiner before the original note was executed. Tittle did not have access to the records of the Bank, and this allegation was erroneous according to the testimony of Holland to the effect that the Bank Examiner did not question the Brick Company's line of credit at the September 1941 examination, but did so at the examination on January 20, 1942. (R. 114-115, 170).

ARGUMENT

The petition fails to show that the Bank has been denied any right guaranteed to it by Federal Statutes, unless it can be said that the Bank's long continued violations of the National Banking laws clothed it with immunity from well settled rules of Civil Law. Tittle participated in none of the many violations of law which the record shows to have been committed by the Bank, its officers, directors and stockholders. As aptly stated by the Court of Civil Appeals, the case does not fall within the rules announced in *Deitrick* vs. *Greeney* 309 U. S. 190; 84 L. Ed. 694, and *D'Oench Company* vs. *F. D. I. Corporation* 315 U. S. 447; 86 L. Ed. 956. These cases go on further than to hold that one who enters into an agreement in violation of the National Banking laws is estopped to set up the agreement to avoid his liability under the illegal transaction. The Bank here is a solvent National Bank with all of its debts paid, and in voluntary liquidation. It is not within the creditor class that can invoke the rule in the decisions referred to, because it has no creditors nor depositors to protect, and can have none in the future. Even though it were in such class the rule referred to does not permit a National Bank, by its own illegal acts, to destroy legal rights of innocent victims who deal with it. We join with the Bank in its solicitude for the protection of the integrity of the National Bank system, but we believe that this commendable object is more likely to be accomplished by visiting upon the guilty stockholders and officers, the consequences of their own illegal acts, rather than permitting them to profit thereby at the expense of innocent victims.

The agreement which Tittle invoked was not an unlawful agreement. The Court of Civil Appeals held in accordance with the settled jurisprudence of Texas, that the agreement operated as an assignment of the contract fund, and created a trust therein. This holding was obviously so sound that the Bank has never questioned it. It did not assign the holding as error in the Supreme Court, and that Court had no jurisdiction to review it.*

The Bank attempted to escape the effect of this holding by urging the absurd doctrine that one who converts trust funds cannot be held liable unless he agreed that he would not do so. It would have had difficulty in taking a position that has been more universally condemned by both Federal and State decisions. The obvious unsoundness of the proposition was no doubt the reason the Supreme Court of Texas did not notice it, of which the Bank complains on page 29 of its brief. The Court was evidently misled as to the state of the record in granting the application, by the same bold and unfounded statements there made by the Bank, as in its petition for certiorari. The Supreme Court of Texas could hardly have considered as doubtful, or calling for further discussion, a principle it had announced in so many of its decisions, and only a short time before in the case of *Wichita Royalty Company* vs. *National Bank of Wichita Falls* 89 S. W. (2nd) 394, 399, from which we quote:

> "The rule that the acceptance of payments from trust funds by a creditor to be applied on its debt

*1. Texas rule of Civil Procedure 476: "Trials in the Supreme Court shall be only upon the questions of law raised by the assignments of error in the application for writ of error, or upon the questions of law which were certified to the Supreme Court from a Court of Civil Appeals."

establishes actionable participation by the creditor in the wrongdoing of the debtor is definitely established and recognized in this State, as well as in other jurisdictions, and by leading textwriters. *United States Fidelity & G. Co.* vs. *Adoue & Lobit*, 104 Tex. 379, 137 S. W. 648, 138 S. W. 383, 384, 37 L. R. A. (N. S.) 409, Ann. Cas. 1914B, 667; *Interstate National Bank* v. *Claxton*, 97 Tex. 569, 80 S. W. 604, 607, 65 L. R. A. 820, 104 Am. St. Rep. 885; *Bischoff* v. *Yorkville Bank*, 218 N. Y. 106, 112 N. E. 759, 761, L. R. A. 1916F, 1059; *Allen* v. *Puritan Trust Co.*, 211 Mass. 409, 97 N. E. 916, L. R. A. 1915C, 518; *Massachusetts Bonding Co.* v. *Standard Trust, etc., Bank*, 334 Ill. 494, 166 N. E. 123, 126; *Havana Central R. Co.* v. *Central Trust Co.* (C. C. A.) 204 F. 546, L. R. A. 1915B, 715; *State v. American State Bank*, 108 Neb. 129, 187 N. W. 769; *Ward* v. *City Trust Co.*, 192 N. Y. 61, 84 N. E. 585; Bogert, Trusts and Trustees, Vol. 4, 907, 912; Morse on Banks and Banking (6 Ed) vol. 1, 317; Perry on Trusts and Trustees (7 Ed.) Vol. 11, 828."

The Bank seeks to invoke the jurisdiction of this Court because, it claims, the National Banking laws were violated. It urges: (a) The transaction of December 31, 1941 created and concealed a new loan to the Brick Company in excess of the amount the Bank could lawfully lend it; (b) The agreement was a secret one, and (c) The note was a sham note never to be paid, and intended only to deceive the banking authorities. It made the same charges in each of the appellate courts, but did not there, nor does it here, cite any portion of the record that tends to support either charge.

At the time the transaction occurred the Brick Company owed the Bank $14,486.46 on its notes, $7,101.80 on five large checks that it had paid and was carrying

as cash items, and an undisclosed amount on numerous small checks that it was carrying in the same manner. The jury found that at the time the agreement was made Thomas told Tittle and Tittle believed, the proceeds of the note he executed to the Bank would be used to discharge the Brick Company's overdraft. Neither finding has been attacked, and both are supported by ample evidence. Thomas testified that the proceeds of the note went into the Brick Company's account. Holland testified that it did not, but on cross examination admitted that he did not know. It is difficult to see how it can be said that the transaction increased the Brick Company's indebtedness to the Bank. There is no evidence to show that the Brick Company was liable on the note, but if such were the case, still its indebtedness would not have been increased because the debt it owed would have remained the same. Tittle had no connection with the Brick Company, and knew nothing about its affairs. He testified, and it was not contradicted, that he did not have access to the books of the Bank, and did not know or have any reason to suspect that the full details of the transaction would not be shown by the Bank's records. If there is any evidence in the record to the contrary, the Bank has failed to cite it.

In the light of Tittle's testimony, quoted on a previous page hereof from page 135 of the record, it is inconceivable that the Bank's counsel would urge that the note was a sham note, or was never intended to be paid. Tittle testified in response to repeated questioning from the Bank's counsel that he knew the Bank could collect the note from him, and that he was responsible for it, though naturally he expected

Thomas to live up to the agreement and apply the proceeds of the contract to its payment. If the Bank had done this it would have lost nothing. The undisputed evidence shows that the Brick Company's overdraft was entirely liquidated on January 20, 1942, including the checks it had on hand at the time the agreement was made, and those that it thereafter cashed without deposits to cover. At that time only about $12,500.00 had been received under the contract (R. 120). Thereafter the Bank received over $20,000.00 from the same source, but instead of applying these sums to the note indebtedness of the Brick Company until paid, it continued in its unlawful practice of permitting the Brick Company to overdraw its account when the overdrafts would bring its indebtedness above the limit fixed by law, and this continued until the Bank went into voluntary liquidation in July 1942. The record shows that the average daily overdraft balance of the Brick Company to have been $4,392.00 in February 1942, $8,678.00 in March 1942, $6,568.00 in April 1942, $3,967.00 in May 1942, and $6,420.00 in June 1942 (R. 110-111). The conduct of the Bank and its officers in this respect was only a continuation of the policy pursued for years in the operation of the Bank in total disregard of the National Banking Laws. The excessive overdrafts of the Brick Company had existed for many months before the transaction occurred. For about ten years the directors had executed notes to the Bank for the accommodation of Thomas and his different ventures, and during the last two or three years its stockholders and attorneys had joined in the wild carnival of lawlessness.

The Bank would boldly disregard the findings of the jury that the note was executed for the accommodation of Thomas to raise funds with which to liquidate the unlawful overdraft. Notwithstanding these findings and the rule of universal recognition that every holder of an accommodation note, except the accommodated party, can enforce its payment, the Bank continues to argue that the note was a sham note, and never to be paid.

Under the circumstances that existed at the time the agreement was made, there can be no doubt but that the transaction was lawful. The Brick Company's indebtedness to the Bank was far in excess of the limit fixed by law, and this subjected the Bank and its officers to the severe penalties prescribed by the Banking Code. Thomas and the directors were personally liable for the excessive loan. The Bank had to enforce payment of the overdraft, and the Brick Company had no funds with which to pay it. It had a deferred asset in the contract fund. The law had been violated, and it would have been unlawful for the Bank to have continued to carry the overdraft in any form, though it was the duty of the Bank and its officers to salvage whatever they could out of the transaction, and if the Brick Company could not have pledged the fund to an outsider and procured the means with which to pay the overdraft, the law would not have been violated by the Bank taking an assignment of the fund. Allowing the overdraft to be incurred, and not the means taken by the Bank to save itself against loss, would have constituted the violation of law.

It is well settled by the Federal decisions that re-

strictions upon loans do not apply when the purpose is to salvage a bad asset. If necessary to accomplish such purpose, the Bank could have lawfully made additional expenditures. See *Holman* vs. *Cross* 75 Fed. (2nd) 909; *Atherton* vs. *Anderson* 86 Fed. (2nd) 518; 99 Fed. (2nd) 883; *First National Bank of Charlotte* vs. *National Exchange Bank* 92 U. S. 122; 23 L. Ed. 679. Further the Banking Law itself, U. S. C. A., Title 12, Section 375A forbidding loans to executive officers of a bank, contains the following exception:

> "Nothing contained in this section shall prohibit an executive officer of a member bank from endorsing or Guaranteeing for the protection of such Bank, any loan or other asset which shall have been previously acquired by such Bank in good faith, or from incurring an indebtedness to such Bank for the purpose of protecting such Bank against loss or giving financial assistance to it"

The net result of the transaction of December 31, 1941 was to substitute a sound and legal asset for a doubtful and illegal one. There is no law, State or Federal, which closes the doors of a National Bank to a solvent person who seeks to borrow funds for the purpose of enabling an unfaithful servant to make restitution for a wrong he has committed.

Tittle was solvent, and had an established line of credit with the Bank. His note was good for far in excess of its amount. It seems preposterous that the Bank would urge that he must be deprived of his security by the unlawful acts of the Bank, and for no better reason than his act in lending his credit to enable Thomas to make good his defalcation, and to enable the Bank to liquidate an overdraft which it could not lawfully carry. No decision relied upon by the

Bank, nor any other decision we have found, stamps Tittle's act as illegal, nor estop him from enforcing against the Bank a valid contract. We do not believe the law will lend its aid to the Bank and save it harmless against its loss on the Brick Company account, which would have been avoided had it lived up to the agreement and thereafter conducted its affairs in accordance with the National Banking Laws.

The Bank is the plaintiff in the case, and the burden was upon it to recover. It attempted to escape the effects of an executed contract by pleading its own violations of the laws. When the fund was paid to the Bank, the contract between the Brick Company and Tittle was fully executed. Tittle did not more than ask that the Bank be forced to account for this fund by applying it to the purpose for which it had been assigned. The case would not have been different if the Brick Company had delivered the checks received by it under its contract to Tittle, and Tittle had delivered the checks to the Bank with instructions to apply the same to the payment of his note. It is wholly immaterial who carried the checks to the Bank, so long as they had been assigned for the purpose of paying the note. Under the strange doctrine the Bank seeks to invoke, it could keep and retain whatever was received, whether from Tittle or the Brick Company, dissipate it and yet enforce payment of its note. The law will not disturb an executed contract because tainted with illegality. Particularly true is this, where the party who himself has violated the law, undertakes to deprive a person innocent of guilty connection with the unlawful act, of property received under the contract.

The remaining points urged by the Bank do not contain the slightest tinge of Federal law. Both rulings attacked are supported by the overwhelming weight of both Federal and State decisions. They certainly do not present a Federal question. It is claimed that the holding that the Bank was charged with the knowledge that came to Thomas during the transaction is contrary to the holding of this Court in *American National Bank* vs. *Miller* 299 U. S. 517; 57 L. Ed. 1310. This contention might be worthy of notice if it presented a federal question and the Bank had not demonstrated beyond a doubt that the later decision of this Court in *Curtis C. & H. Co.* vs. *U. S.* 262 U. S. 315; 67 L. Ed. 956, distinguishing the *Miller* case, is directly in point and against the Bank's contention.

In the *Curtis* case Holbrook, instructed without restrictions, to procure title to Government lands, committed fraud in doing so. Likewise Thomas, an executive officer of the Bank, was entrusted without the restrictions, with the duty of collecting the overdraft, and alone acted for it in doing so by taking the note from Tittle. Therefore he was not, as was Plant in the *Miller* case, engaged in something in which his interest was plainly independent of his agency for the Bank, but as in the *Curtis* case it was to the common interest of Thomas and the Bank that the agreement be made, and that the fund be applied to the note. It was to the interest of the Bank, because it had to enforce payment of the Brick Company's overdraft, or subject itself to the severe penalties for the excessive loan. It was to the interest of Thomas because he was civilly and perhaps criminally liable on account of the overdraft. It was further to his interest so far as Tittle

knew or could ascertain, that the fund be applied to the note because he was personally liable to Tittle on his own note which would have been discharged had the Bank's note been paid. When the duty of liquidating the overdraft was entrusted to Thomas, the Bank knew of his connection with the Brick Company and of his adverse interest, if any existed, just as did the stockholders know of the adverse interest of Holbrook when they entrusted to him the duty of getting the land. The *Curtis* case and the case at bar are parallel, and incapable of distinction, and both are well supported by both Federal and State decisions.

There is no conflict between this holding and that of the Circuit Court of Appeals in *F. & D. I. Co.* vs. *Vest* 122 Fed. (2nd) 765. The unfaithful agent there was engaged in an illegal and fraudulent undertaking of his own, plainly independent of any agency of his principal. The *Vest* case falls within the holding of the *Miller* case.

That proof of the agreement did not violate the parol evidence rule is too obvious to require argument. The agreement was not plead for the purpose of varying or destroying the note, but to show that it had been paid. The Bank's counsel must not have read the *Ellington* and *Robertson* cases, nor the principal case under which the annotations in 71 A. L. R. appear. Had he done so he would have had no difficulty in finding the distinction which he probably refers to as "the fence." The distinction between the *Ellington* and *Robertson* cases is that in the *Ellington* case the Bank received, as did the Bank in Tittle's case, the proceeds of the collateral pledged by verbal agreement to secure the note sued upon; whereas the holder of

Robertson's note did not receive the collateral nor the proceeds thereof. One is a case of accord and satisfaction, whereas the other is a case of accord without satisfaction. This distinction is clearly pointed out in *Bromfield* vs. *Trinidad National Investment Co.* 36 Fed. (2nd) 646; 71 A. L. R. 542, the case under which the annotations cited on page 37 of the Bank's brief appear. To sustain its holding the Circuit Court of Appeals there cited no less an authority than the opinion of this Court in *Paine* vs. *Central Vermont Railroad Co.* 118 U. S. 152; 30 L. Ed. 193, which is also directly in point, and against the Bank's contention. The law of Texas was applicable to this question, but this is wholly immaterial for the reason that there is no conflict whatever in the Federal and State decisions on the subject.

We respectfully submit that no Federal question is involved in the case, and that the rulings made by the Supreme Court of Texas are in accordance with the decisions of the Courts of both Texas and the United States, and the petition for certiorari should be dismissed or denied.

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